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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 576

ERCOLE LEONARDO and ELSIE IRENE LEONARDO,
*Petitioners,*

v.

BOARD OF COUNTY COMMISSIONERS OF ST. MARY'S COUNTY, MARYLAND, a body corporate and politic, and constituting the District Council for "Tall Timbers-on-the-Potomac District", a separate taxing and assessment District, St. Mary's County, Maryland, and J. FRANK BAILEY, Treasurer for St. Mary's County, Maryland, *Respondents.*

## PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

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BYRON S. ADAMS, WASHINGTON, D. C.

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## PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

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### STATEMENT OF FACTS

Since the filing of the petition for writ of certiorari and even after the decision of your Honorable Court denying the writ, certain actions have been taken by the respondents, the Board of County Commissioners of St. Mary's County, Maryland, in which it will be

clearly demonstrated that the respondents have either misinterpreted the decision of the Court of Appeals of Maryland or intentionally construed it in such a way as to entirely circumvent the obvious scope and intention thereof. This misconstruction, if not corrected and acted upon as now proposed, would lead to the confiscation of the property of the petitioners in violation of the Fourteenth Amendment of the Constitution of the United States.

The Board of County Commissioners, through its legal counsel, has indicated by oral conversations and by letter that the said Board intends to purchase or condemn the sea wall that was constructed and owned by the petitioners prior to the establishment of the sea wall District. The basis upon which it proposed to acquire this sea wall frontage of 100 ft., which is owned by the petitioners, is that it would reimburse them for the original cost of approximately $2,000.00 or less for the construction of the said wall. The Court should bear in mind that although the petitioners' wall was not taken by the said Board at the time of construction of the erosion project it, being deemed adequate, was integrated into and incorporated within the District. The Board now proposes to take the wall and assess the petitioners through a benefit tax the sum of $3,030.00, which was arrived at as being the amount this 100 ft frontage of sea wall would have cost the Board had it constructed the sea wall in the manner in which it did construct the sea wall adjoining the petitioners on either side.

All of the testimony in the record was to the effect that the 100 ft. of sea wall that had been constructed by the Leonardos, the petitioners, was in good condition. As a matter of evidence, after the sea wall in

the District (excepting the Leonardos' sea wall) had been constructed, "Hurricane Hazel" came along and weakened a large section of the wall that had been constructed by the County; some of it being practically destroyed while the sea wall built by the petitioners stood firm and secure against the ravages of this hurricane.

On January 22nd, 1958 the County Commissioners, by letter to counsel for the petitioners, advised the petitioners that they would pay "a fair price for his sea wall and that is as far as they can go in this matter." Counsel for petitioners by telephone thereafter, inquired of counsel for the Board of County Commissioners what they meant by a fair price for the sea wall. Counsel for the Commissioners stated that this matter had been discussed by the Commissioners in a meeting held on January 21st 1958 and that they were of the opinion that a fair price would be the out-of-pocket cost incurred by the petitioners in constructing the 100 ft. sea wall. (Not the fair and reasonable cost of replacement nor construction at time of taking, nor even the equivalent of cost to the Commissioners of similar wall constructed in the project as might have been expected and which would have been acceptable to the petitioners.) In the affidavits attached to this motion, said affidavits having been executed by the petitioners and counsel, it is recited in the affidavit of petitioner that the total cost of the sea wall to him was less than $2,000.00; the reason ,of course, for the petitioners being able to construct their sea wall at a substantially lower cost was due partly to the fact that it was constructed at a time when prices for labor and material were not as high as they were in 1953, and petitioner contracted, supervised and labored thereon himself.

The respondents state frankly that they are relying upon the decision of the Circuit Court of Appeals in Maryland as authority to acquire the sea wall of the petitioners and if he refuses to accept his out-of-pocket costs for constructing the wall it will follow, naturally, that the Commissioners will proceed in an action of condemnation to acquire the petitioners sea wall.

In short, the Board would place a value of $2,000.00 or less on the wall for purposes of taking and immediately thereafter place a value in excess of $3,000.00, plus costs and interests for purposes of assessment.

It is the contention of the petitioners that neither the Circuit Court of Maryland nor the Court of Appeals ever intended, under these circumstances, to give to the respondents the power of condemnation of the existing sea wall but that said power was expressly granted to them for the purpose of taking, by condemnation proceedings, land belonging to the petitioners for the purpose of constructing another or additional sea wall; not for the purpose of buying the existing sea wall. The law under which the County Commissioners set up a special taxing district for the prevention of erosion in St. Mary's County provides that

> "Whenever it shall be deemed necessary by said County Commissioners, acting as a District Council for any of said Taxing and Assessment Distracts, to take or acquire any land, structures or buildings, either in fee or as an easement, for the construction, extension or maintenance of any erosion prevention works to prevent erosion by Chesapeake Bay and tributaries, or by an other stream or body of water in this State, in any of said Taxing and Assessment Districts, it may purchase the same from the owner or owners, or, fail-

ing to agree with the owner or owners thereof, may condemn the same, and any interest of any tenant, lessee or other person therein, by proceedings in the Circuit Court for the County as now provided by Article 33A of the Annotated Code of Maryland."

The Court will observe that under this law the County Commissioners have the power to take or acquire any land, structures or buildings "* * * for the *construction*, extension or maintenance of any erosion prevention works." (Italics supplied) It was never intended, under this Act, that the County Commissioners would acquire a seaworthy sea wall which had been constructed by the petitioners, and which had been fully paid for by them. This conclusion is supported by the following statement from the opinion of Judge J. Dudley Digges, of the Circuit Court for St. Mary's County.

"The Court, however, reaches a different conclusion as to the assessment of benefits against the Leonardo lots. As applied to these lots, it is apparent from the testimony that Leonardo had some years prior, constructed a wall in front of his property which was obviously in such condition that the District Council and the Engineers felt it was not necessary to reconstruct a new wall to replace it. In fact, the testimony shows that the new wall, constructed under the authority of the legislation above referred to, tied into this wall, and Leonardo's property received only an incidental benefit from the wall constructed. To require him now to pay a front foot benefit tax would in effect mean that he would pay twice for the wall which he constructed and which is now owned by him and serves as a benefit not only to his property, but to the entire area. It will be noted that the County Commissioners did not attempt to purchase this

wall in front of the Leonardo property, now have no interest therein, and in fact have utilized it for the purpose of preventing water from coming around the end of the newly constructed wall. I am not unmindful of the fact that Leonardo has benefited to some extent at least by the construction of the new wall, since it prevents water from washing around the end of his wall; nevertheless, the benefit tax as assessed against him is disproportionate to the benefit his lots have received, and the action of the County Commissioners in assessing the benefits against this property as they have the other lots, is therefore arbitrary and unreasonable."

Please note that the Court said "to require him now to pay a front foot benefit tax would in effect mean that he would pay twice for the wall which he constructed and which is now owned by him and serves as a benefit not only to his property but to the entire area." And further on the Court states "* * * and the action of the County Commissioners in assessing the benefits against this property as they have the other lots, is therefore arbitrary and unreasonable."

Under the opinion and decree of the lower court the land and property of the petitioners could not be assessed for a tax to pay for the cost of the wall. That, of course, is logical because the petitioners, with their own time and money, had const. ed the wall. The lower court did hold that the petitioners should pay, as an added tax, what it called an "ad valorem tax" to cover the payment of interest on the bonds which had been issued by the County Commissioners to pay for the entire wall and also for the costs of the repairs of maintaining the entire wall. It is difficult for petitioners to understand why they should be assessed

interest on the bonds where the proceeds were used to pay for the costs of the entire wall and where it is agreed by all parties that the District did not pay for the cost of the 100' wall frontage constructed by the Leonardos. The Leonardos concede that it would be proper for them to be assessed for the costs of any repairs which were made to the wall.

Other than that the opinion of the lower court, which should not have provided that the petitioners be assessed for interest, is proper and just.

However, we feel that the Court of Appeals of Maryland went beyond the facts and the law and, as a result, the petitioners are now faced with action by the County Commissioners of St. Mary's County which will confiscate their property in violation of the Fourteenth Amendment.

## CONFLICT OF OPINIONS

So that the Court may clearly understand the differences in the opinions between the lower court and the Appellate Court we now quote from the opinion of the Court of Appeals of Maryland the pertinent section of its opinion as it applies to the petitioners.

> "We come now to the cross-appeal. As the Leonardos had previously constructed a private sea wall in front of their lots, the appellees concede the chancellor was correct in decreeing the two lots owned by the Leonardos were not properly subject to the benefit tax. However, they request that the decree be modified to the extent that if the commissioners acquire an easement in, or ownership of, the private sea wall of the Leonardos, the commissioners *thereafter* could collect the benefit tax from the Leonardos or the subsequent owners of the two lots. We think the decree should be so

modified. As the decree now reads, the commissioners are perpetually enjoined from collecting the benefit tax on these two lots. If, *in the future*, the commissioners acquire an easement in, or ownership of, the sea wall, there is no just reason why they should be prevented from then collecting the assessment." (Italics supplied).

You will note that the Court of Appeals conceded that Judge Digges, of the lower court, was correct, in decreeing that the two lots, owned by the Leonardos, were not properly subject to the benefit tax. Had the Court stopped at that point there would have been no confusion or misinterpretation as to the meaning of the decision of the Court of Appeals, but the Court went on to say that "If the Commissioners acquire an easement in, or ownership of the private sea wall of the Leonardos, the Commissioners *thereafter* could collect the benefit tax from the Leonardos or the subsequent owners of the two lots." Then the Court adds "If, *in the future,* the Commissioners acquire an easement in, or ownership of the sea wall, there is no just reason why they should be prevented from then collecting the assessment."

## RECENT ACTS OF RESPONDENTS

As heretofore stated, since the denial of the writ of certiorari by your Honorable Court, the Commissioners, by oral statement and in writing, have indicated that they propose to buy or condemn the sea wall of the petitioners. It is the contention of the petitioners that it was the intention of both courts not to assess the petitioners with the benefit tax on the sea wall which they constructed and own as long as they, the Leonardos, were in possession of the property, and this right also extended to the subsequent owners.

The Leonardos concede that if a hurricane or some other act of God, or perhaps act of war, demolished the present seaworth sea wall which they had constructed, or for some other valid reason the County Commissioners felt it necessary to build an additional wall on the land of the petitioners, then the County Commissioners would have the authority, under the law, to acquire, either by purchase or condemnation, the *land*, of the Leonardos necessary *for the construction* of the new or additional wall. This, of course, was clearly set forth in the opinion of the lower court and, as a result of that opinion, the County Commissioners have not assessed the Leonardos for either the benefit or ad valorem tax since 1954. However, they will do so unless the opinion of the Court of Appeals is clarified as the Commissioners have the power to make these benefit tax payments retroactive to 1954.

Your petitioners have learned, too, since the denial of the writ, by personal inspection of the records of the County Treasurer of St. Mary's County, Maryland, that all of the owners in the sea wall district have not been assessed, that no money has even been spent for repairs and that although a substantial amount of money has been received since 1954 from benefit tax payments, that the assessments for interest have remained at the same rate. Apparently the Commissioners are of the opinion that they have the right to take these steps even though the effect results in discrimination and confiscation of the property of those who pay the full benefit and ad valorem taxes. These facts were not before the Circuit Court or Court of Appeals of Maryland.

In support of the statements in the foregoing paragraph, as late as January 25th, 1958 the petitioner,

Ercole Leonardo, checked the assessment books in the office of the Treasurer for St. Mary's County, Maryland, at Leonardtown, Maryland, in connection with the separate taxing and assessment district known as Tall-Timbers-on-the-Potomac District. (Affidavit of Ercole Leonardo attached hereto.) His investigation revealed the following facts:

1. No assessment has been levied against Lots 49 and 50 in the first section of the subdivision or against the 47' directly south of lot 50.
2. No assessment has been levied against the 15 roadways, each being 25' wide, title of which vests in the name of Henry J. Juenemann.
3. No assessment has been levied against Lot 9 in the original subdivision.
4. No assessment has been levied against Lots 17 and 37 in the original subdivision.
5. No assessment has been levied against Lot 25 in the 2nd subdivision.
6. No assessment has been levied against Lot 38 in the original subdivision.
7. No assessment has been levied against Lot 57 in the first subdivision.
8. At no point have assessments been made that total $130,410.00 as set forth in resolution dated 10-13-53."

The records checked were for the period 1954 through 1957.

This clearly shows that the respondents, by failing to assess all the tax payers within the District, are

taking the property of the petitioners in violation of the Fourteenth Amendment. To illustrate, in order to retire the bonds according to the terms and conditions of the bond issue, the sum of $6,666.00 must be collected each year from the front foot benefit tax owners. In carrying out the provisions of the terms and conditions of the bond issue the Commissioners assessed each front foot a definite amount sufficient to raise the required amount of $6,666.00 and assessed and ad valorem tax of $3,250 per annum against the project of which $2,750.00 was interest the balance of $500 representing repairs. Had the Commissioners properly assessed all of the property in the District, excluding petitioners, the amount so collected would have reduced the principal of the bond issue and, as a consequence, there would have been a corresponding decrease in the amount of interest assessed. Due to the failure on the part of the respondents to properly assess and collect all of the tax the respondents have not reduced the amount of interest from 1954 to 1957, inclusive, and are still assessing, as late as January 25th, 1958, the amount of $2,750.00 as interest. The reason the writer cites these dull figures is to show the Court that the respondents have misinterpreted the decision of the Circuit Court of Appeals and unless this decision is clarified will attempt to assess and collect from the petitioners for the period beginning in 1954 and thereafter, not only the benefit tax but taxes for repairs, maintenance and excessive interest. This certainly will result in taking the property of the petitioners without due process of law.

Since the petition for the writ of certiorari was denied by your Honorable Court counsel for the petitioners was advised by counsel for the respondents

(affidavit of Thurman Hill attached hereto) that the respondents had assessed all of the lots in the District which had been protected by the sea wall which had been constructed by the respondents out of the proceeds derived from the sale of the bond issue. Apparently counsel for the respondents was mistaken as the respondents did construct a new sea wall in front of Lots 49 and 50 in the original District plus a 47′ lot which extended south of Lot 50. The records show that no assessment has been made by the respondents against Lots 49, 50 or the 47′ extension. Under the decision of the lower court these lots were included for assessment but were excluded by the Court of Appeals on the theory that these lots were either not in the original plat or that there had been an existing wall in front of Lots 49 and 50 and the 47′ extension, making it unnecessary for the respondents to construct a new wall. The Court of Appeals was completely in error in its finding and decision in this respect. Counsel feels that the reason for the mistake on the part of the Court of Appeals came about as follows.

William L. Bowman, County Surveyor of St. Mary's County, testified that he made a survey in regard to the construction of a bulkhead and jetties on the Tall Timbers waterfront. This was as of February 26th, 1951 before the respondents constructed the sea wall which is involved in this litigation. The witness, Bowman, testified, "Then there was no wall at all until you reached the northern sideline of Lot 49 and then the wall was continuous on down out of the subdivision." At no time did Bowman ever testify that this continuous wall was constructed in such fashion as to prevent erosion. The Court of Apeals apparently assumed

that this was what the surveyor meant by this testimony. As a matter of fact, the wall in front of Lots 49 and 50 and the 47′ extension further south was in very poor condition and the respondents did construct a new sea wall in front of these lots and the 47′ extension out of monies derived from the sale of the bond issue. This statement is supported by the testimony of Mr. Chapman Thompson, the Resident Maintenance Engineer of the Maryland State Roads Commission, who had been appointed as an inspector by the County Commissioners of St. Mary's County in connection with the construction of the wall which was performed on Tall-Timbers. During the course of the construction he inspected the wall on an average of three times a week. Mr. Thompson testified, "On the south end of the sea wall it was necessary to continue the wall (new wall) 47′ to tie in with the existing wall that was built there to prevent erosion around the wall that we built."

"Question: 47′ to the south. Here is your water side. Using Lot 50 in the front tier of lots, how far from the southwest corner of Lot 50 does the wall extend?"

"Answer: 47′.

"Question: And it continues from that point across Lots 50 and 49 as shown on this plat and then on northward to Leonardos' wall, and from thence on up to Juenemann's. Is that correct?"

"Answer: Yes, sir."

It should be clear to your Honorable Court that from this testimony the respondents did construct the sea wall in front of Lots 49 and 50 and the partial lot of 47′ and that it was plainly error for the Circuit Court

of Appeals to exclude these lots from benefit tax assessment and ad valorem assessment. The only reason that the counsel can think of which caused the Circuit Court of Appeals to exclude this frontage of 147' from the District was that it misread or misinterpreted the testimony of the County Surveyor, Mr. Bowman, assuming that when the surveyor said that there was a continuous wall in front of lots 49, 50 and the 47' that it was a good, seaworthy wall. Apparently the Court of Appeals overlooked the testimony of the resident maintenance engineer who testified that the respondents did construct *a new wall* in front of these lots, all of which was part of the District Council plan.

The Court may, at this point, inquire what importance is this foregoing point? It is of great importance because the exclusion of this 147' of wall which was constructed with the money from the special benefit and ad valorem taxes results is placing the cost of this particular improvement upon the backs of the other tax payers within the benefit district and by adding the amount of these costs to their assessment results in the confiscation of their property without due process of law in violation of the Fourteenth Amendment.

## CONCLUSION

It is the contention of the petitioners that since the denial of your Honorable Court of the petition for the writ of certiorari that the petitioners have stated grounds of substantial or controlling effect, or other substantial grounds available to the petitioners although not previously presented.

1. The intervening circumstances are that the respondents now plan to condemn the sea wall of the petitioners who were exempted from the benefit taxes by the lower court and who were exempted from the payment of the benefit tax by the Court of Appeals as long as said petitioners own said property or until the respondents acquire said sea wall.

2. That the respondents now plan to assess and collect the benefit and ad valorem taxes from the petitioners, making said assessments retroactive until 1954.

3. That the Commissioners have failed to assess all of the property within the benefit district and are now assessing the other owners for the benefit of a few, facts supporting which were not before the Courts.

4. That the actions of the respondents from the time that the petition for writ of certiorari was filed until the present date indicates that the respondents have misinterpreted the decision of the Court of Appeals.

5. If said decision of the Court of Appeals is ambiguous, as is claimed by the petitioners, then your Honorable Body should grant the writ in order that the ambiguity be removed.

6. As a result of the misinterpretation or ambiguity of the decision of the Circuit Court of Appeals of Maryland the respondents are charging the petitioner and other owners for a sea wall which was constructed for the benefit of the owners of Lots 49, 50 and the owner of the 47' lot.

7. For these reasons the petitioners respectfully submit that this petition for reconsideration of the denial of the writ of certiorari by your Honorable Court should be granted.

In order to conserve the time of the Court, counsel herein has not restated the authorities set forth in the petition for writ of certiorari but does adopt the same as though restated.

Respectfully submitted,

THURMAN HILL,
*Counsel for Petitioners,*

ERCOLE LEONARDO,
ELSIE IRENE LEONARDO,
*Petitioners.*

Dated, Washington, D. C.
February 5, 1958.

**Affidavit**

DISTRICT OF COLUMBIA }
WASHINGTON, D. C. } ss:

Ercole Leonardo of lawful age, first being duly sworn, upon his oath deposes and says:

Your affiant is one of the petitioners in the case of *Ercole Leonardo and Elsie Irene Leonardo, Petitioners* vs. *Board of County Commissioners of St. Mary's County, Maryland, Respondents,* which case is now pending before the Supreme Court of the United States upon petition for reconsideration of the denial of the writ of certiorari.

Your affiant states that upon the 25th day of January 1958 he personally inspected the books and records in the office of the Treasurer of St. Mary's County, Maryland, as said records pertained to the assessments against property owners in connection with the erection of a sea wall by said County Commissioners and your affiant states that all statements and figures used in the petition for reconsideration of the denial of the writ of certiorari were furnished by him from said records and that he did transcribe said information and figures correctly from the record.

Further, your affiant sayeth not.

ERCOLE LEONARDO
Ercole Leonardo

Subscribed and sworn to before me this 29th day of January, 1958.

MARY J. BRUMLEY
Mary J. Brumley,
*Notary Public, D. C.*

(SEAL)

My Commission Expires September 14, 1962.

**Affidavit**

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss:

Thurman Hill, of lawful age, first being duly sworn, upon his oath deposes and says:

Your affiant is counsel for the petitioners in the case of *Ercole Leonardo and Elsie Irene Leonardo, Petitioners* vs. *Board of County Commissioners of St. Mary's County, Maryland, Respondents,* which case is now pending before the Supreme Court of the United States upon petition for reconsideration of the denial of the writ of certiorari.

Your affiant states that since the denial of the petition for the writ of certiorari by the Supreme Court that he has had three of four oral telephone conversations with the Honorable Wm. O. E. Sterling, counsel for the Board of County Commissioners of St. Mary's County, Maryland in reference to the case of Ercole Leonardo and Elsie Irene Leonardo versus said Board of County Commissioners and in addition to said oral conversations received one letter on the stationery of the Board of County Commissioners of St. Mary's County, Maryland in which letter certain things were set forth in reference to said case. In said letter counsel stated "As I advised you on the telephone the Commissioners are willing to pay Mr. Leonardo a fair price for his sea wall and that is as far as they can go in the matter." Your affiant states that thereafter, in a telephone conversation with counsel for the Board of County Commissioners, said counsel advised your affiant that by "fair price" the Commissioners meant the cost price to the Leonardos of constructing the sea wall. Your affiant asked said counsel if the Commissioners would

pay the Leonardos the sum of $3,030.00, which said sum represented what it had cost the Board of County Commissioners to construct the same amount of footage and he answered unequivocally "no".

Your affiant states that in another conversation your affiant inquired of counsel whether the Commissioners would release the Leonardos from the payment of the benefit tax and the interest on the bonds since the Leonardos had paid for the wall which was now being used by the District Council, providing further that the Leonardos paid the cost of repairs and maintenance. To this, Council for the Board of County Commissioners again stated that the Commissioners would not consider such an offer.

Your affiant further states that he advised counsel for the Board of County Commissioners that they had not included upon the assessment records 147 ft. of sea wall which had been paid for out of the bond issue and to this counsel stated that he was quite sure that what I stated were not the true facts.

Your affiant also inquired of said counsel if it were not true that they were still assessing all of the lot owners the same amount of interest that they had originally assessed them in 1954; to wit, $2,750.00, and he said he thought they still were assessing this amount. I then inquired of him whether it was not the duty of the Commissioners to reduce the interest as annual payments were made upon the principal of the bond issue and he said that he presumed that was the intention of the Board but they had not, as yet, been able to do so.

Further, your affiant sayeth not.

THURMAN HILL.
Thurman Hill

Subscribed and sworn to before me this 29th day of January, 1958.

MARY J. BRUMLEY
Mary J. Brumley,
(SEAL) *Notary Public, D. C.*

My Commission Expires September 14, 1962.

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**CERTIFICATE**

I, Thurman Hill, attorney for petitioners herein, hereby certify that the above petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

THURMAN HILL
Thurman Hill

**PROOF OF SERVICE**

I, Thurman Hill, attorney for the petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of February, 1958 I served copies of the foregoing petition for rehearing denying writ of certiorari upon the Board of County Commissioners of St. Mary's County, Maryland, Leonardtown, Maryland and upon Wm. O. E. Sterling, Counsel for said Board, Leonardtown, Maryland, by mailing copies in duly addressed envelopes, first-class mail, to said parties.

THURMAN HILL
Thurman Hill,
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Washington 6, D. C.